

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY BLAKE ROBINSON,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 222416
Oakland Circuit Court
LC No. 99-165710-FC

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and sentenced to three years' probation, with the first year to be served in the county jail. He appeals as of right. We affirm.

I. Facts and Proceedings

Defendant's conviction arose out of an incident that occurred while he was baby-sitting the victim, who was the six-year old daughter of a friend. On February 27, 1999, the victim and her brother were taken by her parents to defendant's apartment, where they were spending the weekend with defendant. Defendant had babysat the children in the past; in fact, when defendant was unemployed he lived in the home of the victim's mother and babysat her and her brother while their mother worked. It is undisputed that defendant was, at least on some occasions, paid for babysitting, though he was collecting unemployment benefits. Based on this previous relationship, the children were affectionate toward defendant and even referred to him as "Uncle Blake." Nonetheless, this was the first time that the victim was to spend the night at defendant's home.

At trial, the victim testified that while at defendant's home, defendant took her into his bedroom, closed the door, removed both their clothes, kneeled down and touched her "private," which she indicated was her vaginal area, with his "private part" (i.e., penis). The victim also testified that she knew defendant touched her with his penis and that it went inside of her because it hurt her and that after she informed defendant that it hurt, he stopped. She further testified that after the incident, she put her clothes back on and joined her brother in the living room.

The victim's nine-year-old brother was also permitted to testify. During his testimony, he recalled that defendant and the victim had been alone in the bedroom on two separate occasions that weekend. He also testified that they remained in the bedroom for about three minutes each time and that, while he believed the bedroom door was open, he could not see in the bedroom from where he was in the living room.

After returning home the following day, the victim informed her mother of defendant's actions. After being informed, the victim's parents immediately took her to the emergency room, where she was examined by Dr. Maraia Bianco-Batlles. Bianco-Batlles testified that during that examination, the victim reported to her that defendant, while kneeling down, placed his penis in her vagina; nonetheless, the examination did not reveal any evidence of trauma or injury to the victim's vaginal area, nor did it reveal any other signs of injury. Despite this, Bianco-Batlles testified that while inserting something in a child's labia majora should cause pain, injury would not necessarily result. Bianco-Batlles also performed a "rape kit" examination on the victim; however, no semen or pubic hair was found as a result of the testing. Bianco-Batlles further testified that the victim's mother informed her that she bathed the victim before bringing her to the hospital and that this could account for the absence of semen and pubic hair.¹

Following the hospital examination, the victim's mother filed a police report. The police officer who took that report testified that she interviewed both the victim and the victim's mother during the preparation of the report and that they did not make any inconsistent statements. She also testified that during the report, the victim informed her that defendant had tried to place his penis in her vagina and that this happened before bedtime.

Defendant testified in his own defense and stated that he never disrobed in front of the victim or tried to penetrate her with his penis. He also denied ever inappropriately touching the victim, and felt that the victim was making false statements at the urging of her parents, opining that the victim's parents were upset with him because he had returned to work full-time and therefore could no longer baby-sit the children on a regular basis.

Defendant also called James Swafford II, who testified that he had known defendant for twelve years and that he was aware of defendant's reputation in the community for being truthful and believed that defendant was known as a very honest person. However, during cross-examination Swafford acknowledged that if defendant had been paid "under the table" while collecting unemployment, it would change his opinion of how honest defendant was "in a work type sense."

Following closing arguments, the trial court read the jury instructions and excused the jury for deliberations. The jury acquitted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a), but found him guilty of the lesser included charge of second-degree criminal sexual conduct, MCL 750.520c(1)(a). On appeal, defendant challenges his conviction on the

¹ In contrast to this testimony, the victim's mother testified that she did not bathe the victim before taking her to the hospital.

grounds that the prosecutor's opening statement, cross-examination of Swafford, and remarks during rebuttal argument amounted to prosecutorial misconduct.

A. The Prosecutor's Opening Statement

Defendant maintains that the following italicized portions of the prosecutor's opening statement were improper:

Ladies and gentlemen, the People are going to prove to you beyond a reasonable doubt that the Defendant, Rodney Blake Robinson, sexually molested a six year old girl. . . . *She is about this tall. She is very shy. She is scared to come in here and testify, and she is going to have a really hard time. She talked about this before and had to sit on her aunt's lap and had her head down in her chest like that, and I am going to ask you to listen very carefully to her because she is going to have a hard time coming in here and talking to a bunch of strangers about what happened.*

Now [the victim] has a mother. [The victim's] mother is Yolanda. Yolanda's sister is Loronda. Loronda is the on-again/off-again girlfriend of the Defendant. Loronda had dated the Defendant for about two years, on-again/off-again. I think her direct words to Detective Wymer is, "*No, we don't date anymore. We just have sex.*" So Loronda and the Defendant had some kind of relationship. [Emphasis added.]

In response to defendant's claim, the prosecution argues that the challenged statements were not improper because they were made in an attempt to indicate the difficulty the victim may have in testifying. The prosecutor further contends that even if the statements were improper, because the trial judge properly instructed the jury that the prosecutor's opening statement was not evidence, and since the jury's verdict could only be based on the evidence, there was no error requiring reversal.

B. The Prosecutor's Cross-Examination of Swafford

Defendant also claims that, because no factual evidence supported certain aspects of the prosecutor's cross-examination of Swafford, the questions amounted to prosecutorial misconduct:

Q. Okay, and you said you think that Defendant is very honest. Mr. Swafford, do you think it is honest to work and get money under the table when you are receiving unemployment? Do you think that is honest?

A. No.

Q. Okay. So if you were to find out that the Defendant was working full-time for cash and was receiving unemployment, would that change your opinion about how honest he is?

A. In a work type sense yes.

Q. I'm sorry?

A. Yes. I mean in a work type sense yes.

Q. Okay. So you think that is dishonest?

A. Yes.

Q. Okay. So have you changed your opinion about whether or not good people can do bad things?

A. Good people can do bad things.

The prosecution denies this allegation by maintaining that there was sufficient factual evidence to support the challenged cross-examination of Swafford. Specifically, the prosecution points out that evidence had been admitted which indicated that defendant was collecting unemployment benefits at the time he babysat the victim and her brother and also that defendant admitted to working "side jobs" while collecting unemployment.

C. The Prosecutor's Rebuttal Argument

Further, defendant contends that the prosecutor committed prosecutorial misconduct by making the following statements during rebuttal argument:

Do you really think that if your neighbor said you did something that we would just haul you off to jail? Is that what happens? Or is there an investigation? Is there a conversation? Is that child interviewed by social workers? By Protective Service Worker? By the police?

* * *

You would be investigated. You are not just hauled off to jail you did it, sit in front of the jury. That is not what happens. The police officer does an investigation. He comes to the Prosecutor's Office. The prosecutor reviews this. There are hearings. There are hearings at lower courts. The defense counsel has an opportunity to evaluate the witnesses, read the police reports. The defendant gets a chance to tell his side of the story. It happens. You are not just dragged off the street. And also people are asked about this alleged victim. Did you hear anyone take the stand and say, oh yes [the victim] lies all of the time? She tells stories all of the time? You didn't hear any testimony about that. An investigation is done, it doesn't happen like that, and defense counsel knows that. You are not just dragged off of the street and thrown into jail. That is not what happens. We have been down a long road in the last five months. You are not just dragged off of the street and charged.

The prosecution denies that these comments were improper and also contends that they were made as a direct response to defense counsel's closing argument, which was as follows:

Let's presume that the person sitting over at the other table is innocent, as innocent are [sic] you are or I am. You are sitting there, and you find out one day that you are accused of this. Just come home from work like any other day, and someone says guess what? The little neighbor girl says you molested her yesterday. . . . What do you do? The prosecutor basically say, "Who has got anything to gain or lose in testifying? The Defendant has something to gain or lose." Well doesn't that leave you in a bit of spot if you are innocent. I mean what are you suppose [sic] to say other than, I didn't do it. And the prosecutor basically implies that, well of course he says [he's innocent], he is guilty. All guilty people say [that they are innocent.] Don't innocent people say that too? I mean what else can they say? There is no video camera there. There are no witnesses. . . . The neighbor kid comes over and plays ball with you and messes around in your garage all the time. Does it ever occur to you that you should have a witness? Of course not. So, how do you defend yourself? What do you say other than I didn't do it? Are you scared? When somebody says, well we know you haven't done anything wrong in your entire life, but guess what? You are a pedofile [sic]. You are a child molester. And then the police. Come on down to the police station. We are your friend. We will help you out. What do you do? What does an innocent person do? And then I would ask, what did [defendant] do in this case? What did he do?

II. Analysis

First, we disagree with defendant's contention that the prosecutor's opening statement improperly urged the jury to sympathize with the victim and referred to facts not in evidence.

It is well-settled that a prosecutor may not appeal to the jury to sympathize with the victim. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999); see also *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987). We are not persuaded that the challenged remarks improperly urged the jury to sympathize with the victim. Rather, due to the nature of the allegations and the age of the victim, it is apparent that the prosecutor was merely attempting to alert the jury that the victim may have difficulty testifying.

Also, while the prosecutor's comment regarding the nature of defendant's relationship with his girlfriend is not supported by the evidence actually offered at trial, we note that reversal is not automatically required when a prosecutor indicates during the opening statement that certain evidence will be presented and the evidence is not presented. See *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997). Instead, reversal is only required if the defendant was prejudiced or there is a showing of bad faith on the part of the prosecutor. *Id.* Here, the record does not indicate that defendant was prejudiced by the comment or that the prosecutor's reference to the matter was made in bad faith. Further, because the trial court clearly informed the jury throughout the case that comments and statements of attorneys are not evidence, the jury was appropriately instructed not to consider the prosecutor's opening statement

as evidence in the case. Cf. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001) and *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Similarly, we find no misconduct with regard to the cross-examination of Swafford. Prosecutorial misconduct cannot be based on good faith efforts to admit evidence. *Noble, supra*; *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which she legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329. We also note that because defendant did not object to the prosecutor's questioning of the defense witness, he must show a plain error affecting his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A review of the record in the instant case reveals that both of the victim's parents as well as defendant testified that defendant earned money by baby-sitting the victim and her brother while collecting unemployment benefits. In addition, defendant admitted during his testimony that he worked other "side jobs" while unemployed. Thus, the evidence provided a sufficient foundation for the prosecutor's questioning of Swafford and was properly admitted into evidence by the trial court. Because there was sufficient foundation for the prosecutor's questions, we are unable to conclude that the prosecutor acted in bad faith and, as such, the prosecutor did not commit prosecutorial misconduct during the cross-examination of Swafford. *Noble, supra*; *Missouri, supra*.

Finally, with regard to defendant's contention that the prosecutor committed misconduct during rebuttal argument, we note that this Court reviews alleged prosecutorial misconduct during closing arguments for harmless error, *People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996). An error is harmless when it appears from the record that it is "highly probable that the error[] did not contribute to the verdict." *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 121 (1998), quoting *People v Gearn*s, 457 Mich 170, 205 (BRICKLEY, J.); 577 NW2d 422 (1998). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context, to determine whether the defendant was denied a fair and impartial trial. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998) and *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Thus, we must consider the prosecutor's statements in light of the defense arguments raised. *Watson, supra* at 593; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Here, the record clearly establishes that the prosecutor's remarks were intended to respond to defense counsel's statements during closing arguments. The record also indicates that, following defense counsel's objection to the comments, the trial court informed the jury that the prosecutor was commenting upon general matters, not facts specific to this case. Therefore, because the remarks were responsive to defense counsel's closing argument, and the jury was aware that the prosecutor was not commenting on facts specific to this case, we conclude that the challenged remarks were not improper. *Messenger, supra*; *McElhaney, supra*; see also *Watson, supra* and *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Accordingly,

the prosecutor's rebuttal argument did not deny defendant a fair and impartial trial. See *Kelly*, *supra*.

Affirmed.²

/s/ Martin M. Doctoroff

/s/ Henry W. Saad

/s/ Kurtis T. Wilder

² Because we conclude that prosecutorial misconduct did not occur, there is no basis for finding that reversal is warranted due to cumulative error. See *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997) and *Watson*, *supra* at 594.